UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff, CRIMINAL NO. 11-CR-20468

-vs-

HONORABLE: ARTHUR J. TARNOW

D-36 VINOD PATEL,

Defendant.
_____/

MEMORANDUM OF LAW REGARDING
ADMISSIBILITY OF THREAT EVIDENCE

Spoliation evidence, including evidence that the defendant threatened a witness, is admissible to show consciousness of guilt. *United States v. Mendez-Ortiz*, 810 F.2d 76, 69 (6th Cir 1986)(collecting cases). The evidence shows "his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the lack itself of the cause's lack of truth and merit." *Id.*, quoting II Wigmore, Evidence, section 278 (Chadbourn Rev. 1979).

In an unbroken string of published opinions, the Sixth Circuit affirmed the admission of evidence that the defendant threatened a witness. E.g., *United States v. Fortson*, 194 F.3d 730, 737 (6th Cir 1999)(such evidence is "generally admissible"); *United States v. Maddox*, 944 F.2d 1223, 1230 (6th Cir 1991); *United*

States v. Paulson, 655 F.3d 492, 508-510 (6th Cir 2011); *United States v. Blackwell*, 459 F.3d 739, 767-768 (6th Cir 2006). Cf. *United States v. Copeland*, 321 F.3d 582, 597-599 (6th Cir 2003)(threats to prosecutor not spoliation evidence, since it does not destroy evidence).

The threat does not have to be free from all ambiguity to be admissible. In *United States v. Blackwell*, 459 F.3d 739, 767-768 (6th Cir 2006), the defendant silently mouthed "I hate you" while the witness was testifying at trial. The witness was allowed to testify that this was a threat. In this case, any possible ambiguity created by combining the highlighted threat with the admonishment to "tell the truth" does not make it inadmissible.

The court must determine under Federal Rule of Evidence 403 whether the probative value of the evidence is "substantially" outweighed by the danger of unfair prejudice. This does not mean "the damage to the defendant's case that results from the legitimate probative force of the evidence," but evidence that suggests a decision on an improper basis. *United States v. Mendez-Ortiz, 810 F.2d at 79.* The *Mendez-Ortiz* court found testimony of a threat and a bribe to be highly probative of guilt and not inflammatory, presenting "little danger" of unfair prejudice. *Id.*

The defendant opened the door to this evidence by introducing evidence of his supposed "consciousness of innocence." During cross-examination of Douglas

Carmack, the defense elicited testimony that the defendant voluntarily returned from India to face these charges. TFO Carmack arrested defendant Vinod Patel at the airport when he returned from India, as arranged with defense counsel. The defendant wants the jury to believe that he knew he was innocent and voluntarily returned to clear his name. The threat evidence rebuts this evidence and shows that the defendant knows he is guilty. It would be unfair to the jury to deprive them of this contrary evidence of the defendant's consciousness of guilt.

The threat evidence is also relevant to the credibility of Atul Patel. The witness will be cross-examined extensively about the benefits of his cooperation agreement. One of the disadvantages of a cooperation agreement is being threatened by the defendant. It would be unfair to the jury to leave them with the false impression that cooperation agreements have only benefits, not disadvantages.

The government does not oppose a limiting instruction, either when the evidence is admitted or at the close of the case. Although the instruction can be worked out between counsel, generally, the jury should be told that the defendant is not on trial for witness intimidation. The evidence is not being admitted to suggest that the defendant has bad character. The evidence is admissible only to show consciousness of guilt and help assess the benefits and disadvantages of Atul Patel's plea agreement.

Respectfully Submitted,

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